

ESTTA Tracking number: **ESTTA471971**

Filing date: **05/11/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91196469
Party	Defendant Blain Supply, Inc.
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Date	05/11/2012
Attachments	Blain's Brief in support of Motion to Strike Opposer's Notices of Reliance 1-3 (00485973).PDF (8 pages)(387251 bytes)

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

FARM FLEET SUPPLIES, INC.,)	Opposition No. 91196469
)	
Opposer,)	Marks: BLAIN'S FARM & FLEET
)	FARM & FLEET
)	
v.)	
)	App. No.: 77894710, 77894766
BLAIN SUPPLY, INC.,)	and 77894812
)	
Applicant.)	

**APPLICANT BLAIN SUPPLY, INC.'S REPLY BRIEF IN SUPPORT OF ITS
MOTION TO STRIKE, IN WHOLE
OR IN PART, OPPOSER'S NOTICES OF RELIANCE NOS. 1-3**

The Applicant, Blain Supply, Inc. by its attorneys, Brennan Steil S.C., hereby submits its reply brief in support of its Motion to Strike Opposer's Notices of Reliance. Applicant reserves its right to raise additional objections as to these Notices of Reliance on substantive grounds in its trial brief.

A. Notices of Reliance Nos. 1-3 should be stricken in whole from the record as Opposer has failed to properly indicate the relevance of the material being offered.

Applicant argued in this Motion that all of the Notices of Reliance of Opposer should be stricken in whole because all of the documents submitted are documents from the Internet and Opposer did not adequately identify the general relevance of the documents to the degree required by the Board. TBMP 704.08 (b). The Opposer just broadly stated in its Notices of Reliance that all the documents were submitted to show the descriptive and generic use of the terms "farm & fleet" and/or "farm and fleet". Such broad statements are not sufficient to meet the requirement for Internet documents submitted with a Notice of Reliance. TBMP 704.08 (b) specifically says it is not sufficient for the propounding party to broadly state that the materials

are being submitted to support the ground at issue. (Motion pp. 1-2). Further, this same section of the TBMP indicates where the same document is being submitted to support more than one element of a claim or defense, the specific element or fact supported by the document must be indicated. Opposer did not do this. Internet documents submitted with only a claim that they relate to a mark being merely descriptive is not sufficient. *Safer Inc. v. OMS Investments Inc.*, 94 U.S.P.Q.2d 1031, 1039-1040 (TTAB 2010). Are all the documents being submitted on genericness, without regard to the documents' context and exposure to consumers? How do trade name recordation documents sitting in Secretary of State records have general relevance to genericness or the existence of secondary meaning? How do SEC filings have general relevance to genericness or secondary meaning? How does an Australian website page have general relevance to genericness or secondary meaning in the U.S.?

Opposer did not address the general relevance requirement in its response brief other than to attempt to make conclusory arguments about its view of the issues in the case – with nothing about the general relevance of each Internet document in the context surrounding each document. (Opposer's Brief pp. 1-3). Pursuant to TBMP 532, such substantive arguments (much less conclusory assertions) are not to be addressed in the context of a Motion to Strike a Notice of Reliance. Such arguments should be addressed in the trial briefs. The only question at issue in this Motion is whether Opposer has met the procedural obligations required for use of a Notice of Reliance to submit Internet documents as evidence for trial. Opposer has not met these procedural requirements and the documents should be stricken from the record for that reason.

B. Notice of Reliance No. 2 should be stricken from the record with respect to the documents identified below as the documents were first produced after the discovery deadline.

Applicant requested that documents in Notice of Reliance No. 2: N-0586, N-0587, N-0544, N-0545, N-0546, N-0548, N-0549, n-0569, N-0570, N-0574, N-0579, N-0580, N-0581, N-

0588, N-0589, N-0590, N-0593, N-0601, N-0614, and N-0534 be stricken from the record as they were not timely produced. (Motion pp. 2-3). Opposer admits in its brief that the documents were served late and attempts to say this is okay because the delay was only three days. (Opposer Brief pp. 3-4). Opposer fails to address why the late service should otherwise be ignored, nor does it explain why Internet documents identified and printed three days after production was due and a month past the closing of the discovery deadline on December 26, 2013 should be allowed. Further, Opposer has offered no explanation as to why the documents in question could not have been discovered and produced prior to the discovery deadline. Simply put, Opposer failed to produce the Internet documents in a timely fashion. Accordingly, these documents should be stricken from the record.

C. Notice of Reliance documents available solely through paid LexisNexis database access are not publically accessible and should be stricken from the record.

Based on the URLs provided by Opposer, Documents in Notice of Reliance No. 1: N-0092, N-0094, N-0407 through N-0408, N-0410 through N-0411 (corporate records) are available only through LexisNexis by paid access. Opposer argued in its brief that documents taken from the LexisNexis database qualify as printed publications under Trademark Rule 2.122(e). (Opposer Brief p. 5) However, Opposer cited no cases whereby the TTAB or any district courts have held that documents retrievable only by a LexisNexis database search accessible only to fee-paying subscribers are considered to be printed publications obtainable on “the Internet as publicly available documents” per TBMP 704.08 (b) to the general public and therefore be admissible by notice of reliance. Applicant has not been able to find any such cases addressing the admissibility of documents from sources available only by paid subscription pursuant to a notice of reliance.

The TTAB has allowed publications in general circulation such as articles from newspapers, magazines and trade publications that are downloaded from LexisNexis to be submitted through notices of reliance. However, these are documents that would also be available to the general public in public libraries. Further, it should be noted that corporate records such as annual reports are not considered printed publications available to the general public and are not admissible via a notice of reliance. *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1363, 101 U.S. P.Q.2d 1713 (Fed. Cir. 2012). Accordingly, these “corporate records” offered by Opposer are not Internet documents publicly available and should not be admissible through notices of reliance. They should be stricken from the record.

D. Notices of Reliance Nos. 2-3 documents that were requested to be stricken from the record in part with respect to the documents identified below as the documents are not publicly available as indicated.

Opposer has argued in its brief that documents covered by Notice of Reliance No. 2: N-0224; and Notice of Reliance No. 3: N-0133, N-0135, N-0137, N-0139, N-0282 are available at the URLs specified on the documents and that Applicant did not type in the correct URLs. (Opposer’s Brief pp. 5-6). Applicant rechecked the URLs for these documents.

Applicant found no document for Notice of Reliance No. 2: N-0224. See attached Exhibit A. So this document should still be stricken from evidence as it is not available to the public.

With regards to the documents covered by Notice of Reliance No. 3: N-0133, N-0135, N-0137, N-0139, N-0282, Applicant was able to find the documents when it used a small case L instead of the numeric 1 in each URL. Accordingly, Applicant withdraws its particular objection to delete these documents due to the argument that the documents are not publically available.

E. Opposer's attempt to correct the defective URL's should be denied to prevent injustice to Applicant and the TTAB.

Notice of Reliance No. 2 Documents Nos. N-0208, N-0209, N-0359, N-0360, and N-0433 did not have any URL identified when Opposer filed it Notice of Reliance. The following documents did not have complete URLs and Applicant could not be access the documents from the information provided by Opposer in the following Notice of Reliance No. 1: N-0115, N-0452, N-0242 through N-0246; Notice of Reliance No. 2: N-0423, N-0425 through N-0426, N-0569, N-0570, N-0579, N-0593; and Notice of Reliance No. 3: N-0031, N-0141, N-0265. (Motion pp. 3-5). Pursuant to *Safer, Inc. v. OMS Investments, Inc.*, 94 U.S.P.Q.2d 1031 (TTAB 2010) and TBMP 704.08(b), an Internet document may be admitted into evidence pursuant to a notice of reliance if the document is publicly available, "that is, it must identify its date of publication or the date it was accessed and printed, and its source (URL)" (Emphasis added).

Opposer has now provided as an attachment to its brief disclosing allegedly appropriate URLs for those documents that did not previously include URLs and/or for those documents that previously had incomplete URLs. (Opposer's Brief, Exhibits A & B). Here, the Opposer's defective documents involved approximately 20% of the documents that it submitted as evidence. This wasn't just one or two documents that were accidentally missed by the Opposer. Applicant's position as to these documents is that Opposer had sufficient time during its testimony period to provide the appropriate documentation consistent with the practice required by the Board. To allow Opposer to correct such defects now would promote a policy whereby parties could file incomplete documents and then correct them outside their testimony period. Such a policy would prolong the TTAB process unnecessarily and would be unfair to the opposing party by increasing the time and money required for participating in a TTAB proceeding. For these reasons, Applicant reaffirms its request that these documents be stricken

because the documents did not meet the requirements for submission by notice of reliance at the time they were submitted.

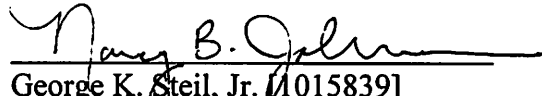
Summary

For the above referenced reasons, Opposer's Notices of Reliance Nos. 1-3 should be stricken in whole or in part from the record. Defendant/Applicant Blain Supply reserves its right to raise additional objections as to these Notices of Reliance on substantive grounds in its trial brief.

Dated this 11th day of May, 2012.

BRENNAN ■ STEIL_{sc}

By:



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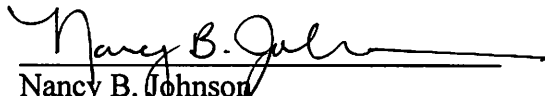
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2012, I caused the following documents:
APPLICANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE, IN WHOLE OR
IN PART, OPPOSER'S NOTICES OF RELIANCE NOS. 1-3
to be served by e-mail and U.S. Postal Service to the following:

Eric O. Haugen
HAUGEN LAW FIRM PLLP
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One East Milwaukee Street
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EXHIBIT A